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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1935.

Number 348.

CITY OF LINCOLN, NEBRASKA, AND STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONERS,

V.

L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT,
RESPONDENT.

BRIEF OF RESPONDENT.

A. W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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L. A. RICKETTS, AS TRUSTEE IN BANKRUPTCY OF LINCOLN TRUST COMPANY, BANKRUPT, RESPONDENT.

BRIEF OF RESPONDENT.

A. W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

SUMMARY OF ARGUMENT.

1. Section 64-b of the Bankruptcy Act does not include municipalities, and the Circuit Court of Appeals in so holding properly applied the rule established by this court in *Davis* v. *Pringle*, 268 U. S. 315.

2. The purported common law right of a sovereign to priority in the payment of its debts does not apply to a municipality or to a political subdivision of the state.

3. The sovereign right to priority cannot be asserted after the title to property of the debtor has passed to a receiver, or trustee in bankruptcy, and such right does not take precedence over rights of other creditors acquired prior to the assertion of the right.

4. The common law right of a sovereign to priority is not in force or effect in the State of Nebraska.

ARGUMENT.

We interpret the scope of the order granting the writ herein to cover any purported right of the petitioner to priority in the payment of its debt under Section 64-b of the Bankruptcy Act.

In deciding the cause the Circuit Court held that a municipality was not included within the purview of Section 64-b, and so holding, did not pass on other matters urged in opposition to the asserted right.

It is therefore our purpose to present our argument as stated in the summary, and as presented in the trial courts and in the Circuit Court of Appeals.

I.

Municipality Is Not Given Priority Under Section 64-b of the Bankruptcy Act.

Any priority given to creditors in bankruptcy proceedings must necessarily be found within the Act itself. These are fixed in Section 64 of the Act (U. S. C. A., Title II, Sec. 104), and the asserted right herein is under paragraph b(7) of the section, which provides:

"debts owing to any person who by the laws of the States or the United States, is entitled to priority; PROVIDED That the term 'person' as used in this section shall include corporations, the United States and the several States and Territories of the United States."

The clause commencing with the word "provided" was added by amendment in 1926, after this court decided *Davis* v. *Pringle,* 268 U. S. 315, wherein the government had asserted that the word "person" included corporations, and that the United States was a corporation within the meaning of the Act; and this court construed the Act to exclude the United States. Congress amended the Act specifically to include the United States and the several States and Territories.

Chapter I, Section 1 (U. S. C. A., Title II, Sec. 1) of the Act, gives the definition of words used, and states that unless inconsistent with the context, words shall be construed as therein set forth. In Subdivision 19 it is stated that the word "persons" shall include corporations, except where otherwise specified, and Subdivision 24 provides that the word "states" shall include the territories. Therefore, unless it was the intent of Congress that Section 64-b (7) (11 U. S. C. A. 104) should be inconsistent with the provisions of the Act, there was no necessity to define the words "persons" and "states", as these words already had been specifically defined. "Corporations" are also defined in (6) of Section I as follows:

"* * * 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint stock companies, unincorporated companies and associations, and any business con-

ducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

In neither the definition of corporation, person, or states, as set forth in Chapter 1, is a municipality included.

To include municipalities in Section 64-b (7), opposing counsel lift the word "corporations" bodily from the context, and then read it in the light of Chapter 1, Section 1 (6), and argue that a municipality possesses *some* of the attributes of "private corporations" and that the word *"some"* implies *"any"*. If Congress intended such result to follow, then why was it necessary to specifically mention the United States, States and Territories in Section 64-b, for they, too, possess *some* of the powers and privileges of private corporations? We are persuaded that the purpose of Section 1 (6) was to show beyond question that private quasi-corporations, such as joint stock companies, limited partnerships, and similar associations were to be included within the definition.

In every other provision of the Act wherein it was intended that a municipality was to be included it is specifically so stated.

In Section 64-a, the provision for the payment of taxes, the Act specifically says that the trustee shall pay taxes "due * * * to the United States, state, county, district or municipality." In Section 17 of the Act wherein certain debts are excepted from discharge, the Act specifically recites those which "are due as a tax levied by the United States, the state, county, district or municipality." Section 57 covering the proof and allowance of claims, in paragraph J, provides "debts owing to the United States, a state, a county, a district or a municipality; as a penalty or forfeiture shall not be allowed * * *."

It will be presumed that Congress had in mind the other provisions of the Act when amending Section 64, and it must be concluded that Congress had in mind a municipality was named in other provisions of the Act, and this must certainly be true in view of the fact that in Section 64 itself in the matter of the payment of taxes a municipality is specifically named. It must also be presumed that at the time the amendment was adopted Congress had in mind the decision of the court in *Davis* v. *Pringle*, *supra*, where a literal construction was given to that section of the Act.

It is true that courts have held that the Bankruptcy Act as a whole will be liberally construed. However, the general intent of the Act is that there shall be a ratable distribution of the assets of the bankrupt amongst creditors, and where any provision of an Act is contrary to the general intent thereof such provision should be and will be strictly construed. The priority provision of the Act is in direct opposition to the general intent thereof.

Where fundamental principles or the general system of the law is departed from, the legislative intention must be expressed with irresistible clearness to induce a court to support a design to effect such object.

The reasoning of Mr. Justice Holmes in *Davis* v. *Pringle* is of as much force in its application to the instant cause as it was to the claim of the United States in the cited case, wherein it was held that the original section was adopted with the United States in view, as it had ordered taxes due to the United States to be paid and naming the United States in that provision. This is the identical situation which presents itself in the instant case, and in fact, the language of the court in *Davis* v. *Pringle* could be paraphrased to fit the case at bar exactly. In

view of this fact, the Circuit Court of Appeals could not have held other than it did without in effect attempting to overrule the decision of this court in the *Davis* case.

In an attempt to avoid the explicit classification of creditors therein contained, counsel for petitioners assert that the emphasis of Section 64-b (7) is upon *debts* owed instead of upon the classes of *creditors.*

The distinction cannot be sustained, as the Act says:

> "Debts owing to *any person who* * * * *is* entitled * * * to priority,"

and then proceeds to define classes of creditors and not debts.

They also forget, at least temporarily, that the entire burden of their argument is predicated upon the alleged peculiarity of the type of *creditor* involved instead of upon any peculiarity in the kind of the debt. In fact, the debt involved herein is in no manner different than other debts.

If, as petitioners contend, Congress was not concerned with the question as to whom the debts were owed, then why was it necessary at all to name classes? It would have been much simpler to have said "all debts given priority by the laws of the States or the United States shall be given priority hereunder."

The only conclusion to be reached is that it was intended that certain classes of creditors were to have priority in the payment of their claims provided such creditors were given such priority by law. Having specifically named the classes to which such priority would be granted, the same will not be extended by the courts.

The petitioners cite authority that the words "person" and "corporations" may include a state and may in certain cases include the United States. It is conceded by petitioner that the interpretation depends upon the connection in which the particular word is used. However, as this court in *Davis* v. *Pringle* definitely construed the provision of the Bankruptcy Act as not including the United States, and as Congress amended the section with the court's definition in view, it would appear unnecessary to look to other authority for a definition of the words used in the section.

It is not difficult to find decisions holding that municipal corporations are not included within the word "person" or corporation in certain statutes. In *County of Sherman* v. *Simonds,* 109 U. S. 735, this court held that the word "corporation" did not apply to a county. *City of Dallas* v. *Halford, et al.,* (Tex. Civ. App.) 210 S. W. 725, holds the word "corporation" does not embrace municipalities. The case cites a large number of authorities supporting the rule, including that of *Sherman County* v. *Simonds, supra,* and that of *Bloomfield* v. *Charter Oak Bank,* 121 U. S. 121, and *East Oakland* v. *Skinner,* 94 U. S. 255. *C. O. Pick Co.,* (D. C. Ore.) 9 Fed. (2d) 207, construed Section 64-b before the amendment and holds that a state industrial commission is not a corporation, although such commission had many characteristics of a corporation, and had been held to be such by the state court. Other cases supporting the rule are:

Carrollton Furniture Manufacturing Co. v. *City of Carrollton,* 104 Ky. 525, 47 S. W. 439.

Donahue v. *Newburyport,* 211 Mass. 561, 98 N. E. 1081.
People v. *Rinaker,* 252 Ill. 266, 96 N. E. 987.
City of Cloquet v. *N. W. State Bank,* 172 Minn. 324, 215 N. W. 174.
McBride v. *Board of Commissioners,* 44 Fed. 17.
Berton v. *All Persons,* 176 Cal. 610, 170 Pac. 151.
Monroe Water Works v. *Monroe,* 135 Wash. 355, 237 Pac. 996.
Atlanta v. *Smith,* 99 Ga. 462, 27 S. E. 696.
Osborne v. *Osborne;* 104 Kan. 671, 180 Pac. 233.
Whitaker v. *Toulumne,* 96 Cal. 100, 30 Pac. 1016.
State v. *Rich,* 126 Md. 643, 95 Atl. 956.
Divine School District v. *Koehler,* 212 S. W. 238.
Rusk Farm Drainage District v. *Industrial Commission,* 186 Wis. 232, 202 N. W. 204.
Rosenstock v. *New York,* 91 N. Y. Supp. 737.
Moscow Hardware Co. v. *Colson,* 158 Fed. 199.
State of Florida v. *Peninsular Telephone Co.,* 73 Fla. 913, 75 So. 201.

Petitioner cites other cases holding that statutes will be construed to avoid unnecessary hardship. In the instant case there is nothing in or outside the record that discloses that any hardship will follow by adherence to the decision of the Circuit Court. Failure to give the insurance company priority over other creditors certainly causes no hardship, but on the contrary, prevents injustice and inequity.

Theoretically it may be true that the Act discriminates against a municipality, but discrimination and hardship are entirely different matters, and mere discrimination will not justify a court to construe a statute contrary to the plain provisions thereof.

The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A casus omissus does not justify judicial legislation.

Ebert v. *Poston,* 266 U. S. 547.

United States v. *Weitzel,* 246 U. S. 533.

State ex rel v. *School District,* 99 Neb. 338, 156 N. W. 641.

Rusk Farm Drainage Company v. *Industrial Commission,* 186 Wis. 232, 202 N. W. 204.

II.

Sovereign Priority Right Does Not Apply To a Municipality.

It is not our purpose to enter into a lengthy discussion of the general question of the right of a sovereign to priority in the payment of its debts. The decisions on the question and discussions thereof are innumerable, and are in hopeless conflict.

Learned discussions of the rule may be found in annotations contained in 90 A. L. R. 184; 51 A. L. R. 1355; 65 A. L. R. 1331.

An interesting discussion, concisely stated, can be found in 47 Harvard Law Review, commencing on page 841. In part the author states:

> "The recent wave of bank failures has served to revive interest in the old, yet still unsettled problem of the priority of the state in the assets of its debtors. Although once well established, the theory that the claims of the government stand ahead of all others as a matter of sovereign right has, to a certain extent, been undermined either by direct

reversal of the rule, or by indirect delimitation of its application. Despite the great mass of precedent which has accumulated over the years, the question is still litigated today as frequently as the ingenuity of counsel is able to devise a legalistic distinction that may give an excuse for its reappearance. The layman viewing the intensely practical question of a reduced dividend or the impediment of a reorganization may well be awed at the usual answer propounded by the courts. He is apt to find a learned discussion of the English common law prior to the reign of James I.

"The initial step of the usual judicial approach is to refer to the constitutional or judicial adoption of the common law and statutes of England. Then will appear citations from Coke on Littleton, and the statute 33 Henry VIII, followed by a discussion of the difference between the personal and incidental prerogatives of the English King. In many cases, the decision will be that the state as the representative of the people, has succeeded to the royal right. Some jurisdictions have in due course codified this rule. Other cases, however, have with equal facility quoted from Kent's Commentaries and found the prerogative of the Crown repugnant to the theory of democratic government. Although these standardized opinions continue to appear, in recent years some courts have apparently recognized the futility of an extended common-law analysis, contenting themselves with the citation of a paragraph of authority on each side, and a statement that the reasoning of one or the other line of decisions seems the better. The result is a fairly even conflict in the cases, for while most of the earlier decisions granted the preference, the later ones have shown a trend in the opposite direction.

"That the prerogative is not considered as favorably today as formerly may indicate a recognition by the

courts that the burden of the common loss should not be borne by particular individuals, but should rather be distributed equally among all through taxation. This feeling is discernible not only in the growing tendency to deny the state priority altogether, but also in the persistency with which those courts which have accepted the doctrine on grounds of stare decisis have seized upon its archaic limitations and upon all conceivable distinctions afforded by pertinent legislation to confine its application to the narrowest possible limits. The almost unanimous group of decisions refusing to extend a preference to the political subdivision of the state may be regarded as the initial indictment of a policy difficult to pursue to its logical conclusion, although the formal ground relied upon has been that the prerogative is an indivisible sovereign right lodged only in that political body representative of all the people. Only an occasional opinion has declared that the necessities of municipal government fall within the reason for the state's preference."

In the note to the above article the author states that in approximately nine states the right is still recognized, while in sixteen states it is denied. We have not verified this statement.

On page 846 the author further states:

"Despite the wide divergence of result apparent in most situations involving the claim of the state to priority, the cumulative effect of all the decisions unquestionably indicates a growing regard for the hitherto neglected general creditor."

In *Davis* v. *Pringle, supra,* Mr. Justice Holmes states:

"Public opinion as to the peculiar rights and preferences due to the sovereign has changed."

Again Mr. Justice Holmes in speaking for the court in *White* v. *Mechanics Securities Corporation,* 269 U. S. 281, states:

> "There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past, and it may be that the enactment was intended to exhibit the self-denial that, whether intended or not, was achieved in the Bankruptcy Act in regard to the priority of liens."

In earlier decisions by this court it was indicated that the United States acquired part of the royal prerogatives of the Crown. *The Dollar Savings Bank* v. *The United States,* 86 U. S. 227. In *United States* v. *Herron,* 87 U. S. 251, it is indicated that the United States by reason of its sovereignty is not bound by any statute unless specifically named, and that for this reason debts due to the United States were not discharged by the Bankrutcy Act then in force.

A learned discussion of the rule can also be found in *Fidelity and Deposit Company* v. *Brucker,* 183 N. E. 668, 205 Ind. 73, 90 A. L. R. 167, preceding the annotation hereinbefore referred to.

As the rights of a state are not here involved, but those of a municipality or its assignee, we will confine our discussion, insofar as possible, to that particular phase of the matter. This question has also been annotated in A. L. R., and in addition to the notes above referred to, others specifically applying the rule to political subdivisions of a state may be found in 36 A. L. R., page 640, and 52 A. L. R., commencing on page 754. An examination of these annotations and all other sources of information and digests *discloses that no case can be found in which a municipality was given priority over other*

creditors in bankruptcy proceedings based on a sovereign prerogative right to such priority. On the contrary, it is shown that in more than a score of states the courts have held that the political subdivisions of the state do not have any such priority under any circumstances, and the courts hold that this is true in many instances, although the state itself was held to have such right. Part of the cases denying the right are as follows:

Aetna Casualty Co. v. *Bramwell,* 12 Fed. (2) 307 (D. C. Ore.).

Hammons v. *U. S. F. & G. Co.,* 30 Ariz. 480, 248 Pac. 1086.

U. S. F. & G. Co. v. *McFerson,* 78 Colo. 338, 241 Pac. 728.

Lake Worth Inlet Dist. v. *First American Bank,* 97 Fla. 174, 120 So. 316.

Glynn County v. *Brunswick Terminal Co.,* 101 Ga. 244, 28 S. E. 604.

People v. *Home State Bank of Grant Park,* 338 Ill. 179, 170 N. E. 205.

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Phillips v. *Yates Center Nat. Bank,* 98 Kan. 383, 158 Pac. 23.

Farmers Bank v. *Bailey,* 221 Ky. 55, 297 S. W. 938.

Bignell v. *Cummins,* 69 Mont. 294, 222 Pac. 797.

Boone County v. *Cantley,* 330 Mo. 911, 51 S. W. (2d) 56.

County Com'rs. of Frederick Co. v. *Page,* 163 Md. 619, 164 Atl. 182.

Re Northern Bank, 148 N. Y. Supp. 70, 163 App. Div. 974, 212 N. Y. 608, 106 N. E. 749.

Cherry v. *Territory,* 17 Okla. 221, 89 Pac. 192.

City of Sturgis v. *Meade County Bank,* 38 S. D. 317, 161 N. W. 327.

U. S. F. & G. Co. v. *Rainey,* 120 Tenn. 357, 113 S. W. 397.

U. S. F. & G. G. Co. v. *Centropolis Bank,* 17 Fed. (2) 301.

Denson v. *Shaw,* (Tex. Civ. App.) 62 S. W. (2d) 344.

San Miguel County v. *Peoples Bank,* 34 N. M. 166, 279 Pac. 60.

Re Valley Deposit Co., 311 Pa. 495, 167 Atl. 42.

U. S. F. & G. Co. v. *Carter,* — Va. —, 170 S. E. 764.

Calhoun County Court v. *Mathews,* 99 W. Va. 483, 129 S. E. 399.

In re Waller, 142 Fed. 883 (Md.) (In Bankruptcy Proceedings).

Reichert v. *Plymouth United Savings Bank,* 269 Mich. 136, 256 N. W. 831.

Montgomery v. *City of Athens,* 155 So. 551.

In re Franklin Savings & Trust Co., 316 Pa. 125, 173 Atl. 288.

The reasoning of the courts in arriving at the conclusion that the prerogative right does not extend to a municipality or any other political subdivision of a state is set forth in a scholarly manner in *Bignell* v. *Cummins,* 69 Mont. 294, 222 Pac. 797, 36 A. L. R. 634:

> "Sovereignty must involve the general interest of the state at large. It is true that the whole state has an interest in the proper administration of its laws everywhere within its borders, and so it has an interest in the proper government of every county, and so it has in every municipality and in the conduct of every school district and in the prosperity

of every citizen. But while the prerogative of the state may be involved for the protection of the rights of the county, municipality, school district and citizen, it does not follow that any of these possess that power. It must be held that the sovereign right, the prerogative, is lodged in the political power which is created by and is the representative of all the people—the state itself, and that the prerogative of the state may not be exercised by its creature in the absence of express authority granted to the creature."

In *Glynn County* v. *Brunswick Terminal Co.*, 101 Ga. 244, 28 S. E. 604, the court says:

"While it may be true that the state, on account of its prerogative right, has this preference, we cannot hold that the same right applies to the counties of the state. We have no statute which gives a county which is a depositor in a bank a lien or preference over other depositors of the same class."

We also quote from *Calhoun County Court* v. *Mathews*, 99 W. Va. 483, 129 S. E. 399, as follows:

"The sovereignty of the King was a united, entire, and indivisible sovereignty. We find no case under the common law conceding sovereignty to a political division or municipality of England."

Sloan Ship Yards Corp. v. *United State Shipping Board*, 258 U. S. 548, 66 L. Ed. 762, holds that the United States Shipping Board Emergency Fleet Corporation was not entitled to preference in payment of a claim against a bankrupt, although all the stock of the corporation was owned by the United States, and it had been given a large number of governmental powers and irrespective of the fact that it was an arm and agency of the United States. It was held to be a separate entity not having the statutory priority right held by the United States.

Reichert v. *Dillman,* 249 N. W. 625, 264 Mich. 182, holding that a priority cannot be asserted by a state highway department.

In the recent case of *Ghinger* v. *Pearson,* 168 Atl. 105, — Md. —, the Court of Appeals of Maryland holds that a statute of the state giving municipalities the right to withdraw funds from banks while such banks were closed during the banking holidays, was invalid as being in violation of the Constitution of the state guaranteeing equal protection to all persons, and that the law cannot be sustained under the police power as emergency legislation.

The petitioners cite several cases which they contend support the theory that the priority may be asserted by a political subdivision of a state. The first of these cases is *In re Worcester County,* 102 Fed. 808, (1 C. C. A., 1900). The claim was for a balance due for the hire of prisoners. The priority was based on a specific statute of Massachusetts which awarded priority to all debts due to the state, county, city, etc. The claim to priority was not based on the sovereign right theory. It seems to have been conceded that the county was a corporation.

Another case cited is *City of Denver* v. *Stenger,* 295 Fed. 809. This was a receivership proceeding, and no construction of Section 64 of the Bankruptcy Act was involved. The Supreme court of the state had not as yet passed upon the question of the prerogative right of the city. Since that decision the Supreme Court of Colorado in *U. S. Fidelity and Guaranty Co.* v. *McFerson,* 78 Colo. 338, 241 Pac. 728, has specifically held against the right.

The only other cases cited by petitioners at all bearing on the question are those of *Marshall* v. *New York*, 254 U. S. 380, *In re Almanac Co.*, 42 Fed. (2) 120, and *State of Oregon* v. *Ingram*, 63 Fed. (2) 417. The Marshall case was also a receivership proceeding in which the state itself claimed priority, and hence would have no application to the instant case involving the rights of a municipality in a bankruptcy proceeding. The other cases will be discussed later.

Authorities are cited by petitioners that a city is an agency of the state. Broadly speaking, this is no doubt true, as it is also true that as such agency the municipality has only such powers as are expressly given, or implied, as being essential to carry into effect the powers expressly granted.

Barnett v. *City of Dennison*, 154 U. S. 135.
City of Ottawa v. *Carey*, 108 U. S. 109.

It is stipulated that the City of Lincoln is governed by a home rule charter and it has been on numerous occasions decided by the Supreme Court of Nebraska that this was a grant of powers and not a limitation. *Consumers Coal Company* v. *City of Lincoln*, 109 Neb. 51, 189 N. W. 643, and *Standard Oil Co.* v. *City of Lincoln*, 207 N. W. 172, 114 Neb. 243, which latter case was affirmed by this court, 275 U. S. 504. It is not shown by the record as to the powers or rights granted to the municipality, and therefore to hold in favor of petitioners it would be necessary to assume first, that the priority right exists in the State of Nebraska, and second, that this power could be and was granted to petitioner, which we believe would be an improper pyramiding of presumptions.

It might also be of interest to distinguish between the rights of a city in its proprietary capacity and its governmental capacity, and determine whether a city when engaged in a purely commercial transaction of the kind here involved should be given priority in payment over the private citizen.

Henry v. *City of Lincoln,* 140 N. W. 664, 93 Neb. 331, 50 L. R. A. (N. S.) 174, holds that the City of Lincoln, while engaged in an ordinary business enterprise

> "is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation. It is subject to the same liabilities and entitled to the same defenses, no more and no less."

This rule also applies to a state, *Davis* v. *Gray,* 83 U. S. 203, *Southern Railway Co.* v. *North Carolina Railway Co.,* 81 Fed. 600, *In Re Valley Deposit & Trust Co.,* 311 Pa. 495, 167 Atl. 42.

III.

Sovereign Right To Priority Cannot Be Asserted After Title To the Property of the Insolvent Has Passed.

It appears to be nearly the universal holding of the courts that the purported right to priority of the sovereign is lost unless the right is asserted prior to a transfer of the debtor's property for the benefit of creditors, either by assignment, the appointment of a receiver, or an adjudication in bankruptcy. In the instant case the petitioners originally filed a claim against the bankrupt as a general creditor, and it was so allowed.

Thereafter the allowance was set aside and an amended claim was filed, and even this claim did not assert priority on the sovereign right theory (Rec. p. 10), but was based entirely on the theory that the funds received by the bankrupt was a traceable trust fund.

The rule is supported in the cases most relied upon by petitioners, to-wit: *City of Denver* v. *Stenger,* 295 Fed. 809, wherein it is stated as follows:

> "The fourth contention, that the preference as sovereign is lost when specific liens exist in advance of the assertion of the preference by the sovereign is stated too broadly. This preference given by the common law was an inchoate right which attached only from and as of the time when it was properly claimed or asserted and did not affect or take precedence over liens which were fixed upon the property prior to that time and were then in force."

The court then cites with approval from *State of Wyoming* v. *Foster,* 5 Wyo. 199, 38 Pac. 926, 29 L. R. A. 226-245, where it is stated that the right cannot be asserted after a general assignment for creditors.

In *Marshall* v. *New York,* 254 U. S. 380, also relied upon by petitioners, Mr. Justice Brandeis, speaking for the court, says:

> "The priority could be defeated or postponed only through the passing of title to the debtor's property, absolutely or by way of lien, before the sovereign sought to enforce his right."

Further, the court says:

> "* * * the priority does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right."

The court refers to *City of Richmond* v. *Bird*, 249 U. S. 174, 63 L. Ed. 543, stating:

> "The city sought there in vain to have taxes declared payable out of the bankrupt's assets in preference to the claim of the landlord thereon, which was secured by a specific lien arising upon distraint. This court held that the city did not have such superior right, since neither the laws of the United States nor those of Virginia accorded such priority."

Other cases sustaining the rule that the priority of the state is lost by divesting of title or by appointment of a receiver are as follows:

State v. *Williams*, 101 Md. 529, 61 Atl. 297.

Zimmerman, Commissioner, v. *Chelsea*, 161 Mich. 691, 125 N. W. 424.

State of New Mexico v. *First State Bank*, 22 N. M. 661, 167 Pac. 3, L. R. A. 1918 A 394.

State v. *Carlyon*, 166 Wash. 498, 7 Pac. (2d) 572.

Aetna Casualty Co. v. *Moore*, 107 Wash. 99, 181 Pac. 40.

Public Indem. Co. v. *Page*, 161 Md. 239, 156 Atl. 791.

In re Devlin, (D. C. Kans.) 180 Fed. 170.

Middlesex County v. *State Bank*, 29 N. J. Eq. 268.

State v. *Peoples Savings Bank*, 23 N. M. 282, 168 Pac. 526.

Nat'l. Surety Co. v. *Pixton*, 60 Utah 289, 208 Pac. 878, 24 A. L. R. 1487.

Nat'l. Surety Co. v. *Morris*, 34 Wyo. 134, 241 Pac. 1063, 42 A. L. R. 1290.

Re Central Bank, 23 Ariz. 574, 205 Pac. 915.

That an adjudication in bankruptcy entirely divests the title of the bankrupt, and invests the trustee with the same, can no longer be doubted.

Section 70 (a) of the Act provides:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualifications, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him;"

Section 47 (a) (2) provides:

> "* * * and such trustees, as to all the property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon * * *."

Isaacs v. *Hobbs*, 282 U. S. 734.
Mueller v. *Nugent*, 184 U. S. 1.
Stratton v. *New*, 283 U. S. 318.
Gross v. *Irving Trust Co.*, 289 U. S. 342.

Section 67 of the Act in effect sets aside or gives the trustee the benefit of attachments, executions, liens and conveyances of the bankrupt's property obtained within four months before the filing of the petition.

Section 67 of the Act was construed in *First National Bank* v. *Staake*, 202 U. S. 141, wherein it is held that any rights obtained by an attaching creditor may be preserved by the trustee in bankruptcy, but that the attaching creditor loses any individual rights obtained under the attachment. This rule is also sustained in *Globe Bank & Trust Company* v. *Martin*, 236 U. S. 285, wherein it is also held that the attaching creditor acquires no rights under Section 64-b of the Act notwithstanding the

fact that the attachment of the debtor's property originally gave him a preference over other creditors.

Under the plain provisions of the Act and the construction placed thereon by this court it would seem impossible to assert priority rights under the sovereign prerogative theory, as the sections above quoted make no exceptions and would therefore invalidate executions and attachments in favor of the sovereign.

We have heretofore referred to the cases *In re Almanac Operating Company,* 42 Fed. (2d) 120, and *State of Oregon* v. *Ingram,* 63 Fed. (2d) 412, cited by petitioners in support of the theory that the sovereign priority may be asserted in bankruptcy proceedings, and it is true that these two cases, standing alone, so hold. In the first case the holding is based on a claim of the State of New York, under the New York law, where it has been definitely established by judicial decision that the priority is in force. The question whether the right could be asserted after an adjudication in bankruptcy is neither raised nor passed upon.

In the second case, the *Ingram case,* the claim is also based on a debt due to the state, and the question whether it can be raised in bankruptcy proceedings, is passed upon, and it is held therein that it can be. The decision is based on the theory that the adjudication in bankruptcy did not pass the title to the property of the bankrupt to the trustee. Under the many holdings of the courts and under the plain provisions of the Bankruptcy Act itself, we believe that this latter case is in error in this regard.

IV.

The Common Law Priority Right is Not in Force in the State of Nebraska.

The petitioners' contention is, and of necessity must be, based on the theory that the right to priority exists in the State of Nebraska by reason of the fact that Nebraska adopted the common law of England except where inconsistent with other laws of the state. The statute is quoted on page 26 of their brief, and we refrain from repeating the same. This provision of the statute has been before the Supreme Court of the State of Nebraska on several occasions and in nearly every instance the court has found it ineffective, for one reason or another.

Williams v. *Miles,* 62 L. R. A. 385, 62 Neb. 566, 87 N. W. 315:

> "The term 'common law of England,' as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana Purchase. Hence, the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system."

In re Grainger's Estate, 237 N. W. 153, 121 Neb. 338.

In *Brooks, et al.* v. *Kimball County,* 127 Neb. 645, 256 N. W. 501, decided by the Nebraska court on September 21, 1934, the court says:

> "* * * this state adopted the common law of England and not the statutory law of England."

The second syllabus is as follows::.

> "Statute adopting common law of England held not to include adoption of statutory law of England, or of common law as modified by statute."

Moran v. *Moran, et al.*, 101 Neb. 386, 163 N. W. 315, holds that the rule in *Shelley's Case* is not in force in the State of Nebraska.

Farmers & Merchants Insurance Company v. *Jensen*, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861, holds that the statute of uses is not in effect in Nebraska, and after quoting the Nebraska statute, says:

> "In terms and ordinary import, the foregoing appears to be of 'the common law of England,' and not of the statutory laws, or of the former as modified by the latter."

Delaney v. *Errickson*, 10 Neb. 492, 6 N. W. 600, holds that the principles of the common law with reference to trespass by animals is not in force in Nebraska.

Wattles v. *South Omaha Ice Company*, 50 Neb. 251, 69 N. W. 785, holds that the common law construction of a lease covenant to return the property in the same condition, etc., which makes the tenant liable in case of destruction of the premises by fire, is not in force in Nebraska.

Bloomfield State Bank v. *Miller*, 55 Neb. 243, 75 N. W. 569, 44 L. R. A. 387, holds the doctrine of equitable mortgages by the deposit of title deeds, although a part of the law of England, is not the law of Nebraska.

An exhaustive search of the authorities fails to reveal whether the sovereign theory was originally based on an English statute or purely on the common law; probably

the latter is correct. However, it appears from the various citations that the right was modified by statutes of England. See *U. S. F. & G. Co.* v. *Bramwell,* 108 Ore. 261, 217 Pac. 332, which refers to statute of 25 Edward III.

In re Carnegie Trust Co., 206 N. Y. 390, 99 N. E. 1096, 46 L. R. A. (N. S.) 260, refers to statute of 33 Henry VIII.

Fidelity and Deposit Company v. *Brucker,* 205 Ind. 73, 183 N. E. 668, 90 A. L. R. 167, uses the following language:

> "No specific rule of the common law (nor any statute) existed in 1607 by which the sovereign could claim a priority in the case of a bank deposit; the Bank of England, the first institution through which the government did a banking business, was not founded until 1694. It does not follow from the general rule of the common law, giving a preference to the sovereign in governmental matters, that such a preference should exist where the state deposits money in a bank to earn interest, pursuant to a contract."

Counsel state that the direct question involved herein has not been passed upon by the Supreme Court of the State of Nebraska. Technically speaking, this is true. However, the Supreme Court Commission of the State of Nebraska on June 16, 1931, filed an opinion in the case of *State of Nebraska ex rel.* v. *S. S. Hadley Co.,* which did pass directly on the question. A complete copy of this opinion, with the order of the Supreme Court approving it and the statute under which the Commission acted, are set forth in the appendix to this brief.

Irrespective of the fact that the commissioner's opinion does not, under the statute, constitute a precedent for other decisions, it is a judgment of the Supreme Court and, we believe, considered the law of the state until overruled by an express opinion of the court itself, and

in the words of the District Court, we consider it persuasive of what the rule is in Nebraska until the court itself holds otherwise.

Re P. J. Potter Sons, (D. C. Ky.) 143 Fed. 407, states as follows:

> "We can hardly doubt that any priority of payment allowed under Section 64-b (5), so far as it is therein made to depend upon the 'law of the state' must be evidenced by some statutory provision or by a judicial rule so certainly established as to put it upon the level of a statutory enactment, and it is clearly incumbent upon the person who claims priority to show the existence of such law."

The only statute in Nebraska with reference to the distribution of the assets of a defunct trust company is Section 8-212, C. S. Neb. 1929, which provides that funds deposited with the Department of Trade and Commerce under Section 8-209 of the statute shall be primarily liable for obligations of the company while acting as guardian, executor, and other trusteeships by appointment of court or under a will, and provides that this fund shall not be liable for other debts of the company until the liabilities referred to have been first discharged.

There are other provisions of the Nebraska Compiled Statutes of 1929 which in several instances fix priorities of debts of insolvents, instances being as follows:

Decedents' Estates, Sec. 30-615;

Assignments for Benefit of Creditors, Sec. 6-124; and

Defunct State Banks, Sec. 8-1102,

which provides that the claims of depositors for deposits, *"not otherwise secured,"* and claims of holders of exchange shall have priority over other claims, excepting taxes. In none of the statutes referred to is the State

of Nebraska given any priority in the payment of debts due to it. Other Nebraska acts which tend to show that the state claims no sovereign rights of the nature herein contended for, are as follows:

The state may be sued.
Const. of Neb., Art. V, Sec. 22;
Sec. 27-342;
Sec. 27-325.

The state is liable for costs,
Sec. 27-328,

and is generally barred by the statute of limitations.
Sec. 20-218.

Its judgments are collected the same as other judgments, Sec. 27-330.

Section 77-2601 confers upon public officers the right to bring suit to recover public funds loaned or deposited, and grants no priority to such recovery.

It is seen that Nebraska has at no time assumed any right of priority in the payment of its debts except for taxes.

In *State of Alabama* v. *Martin,* (C. C. A. 5) 256 Fed. 313, it is held that the priority laws of Alabama, being almost identical with those of Nebraska, do not grant the state a priority, holding that if the state wished such priority it would have provided so by statutory provision, and in the absence thereof the priority does not exist.

Nebraska has had its share of bank failures, and numerous cases involving an asserted right to priority by political subdivisions have been passed upon by the court. Except in the one case decided by the Commission,

the sovereign right theory has never been asserted, but the right has always been based on the trust fund theory.

Instances of attempts made to assert priority are as follows:

State ex rel. Sorensen v. *First State Bank,* 122 Neb. 109, 239 N. W. 646,

wherein a surety company for a city, holding security for its deposit asserted a right to priority, claiming that it should be on the same basis as other depositors, and the court held that the claimant was "otherwise secured," and that it was not entitled to the same priority as other depositors. There are several other cases along the same line and holding the same.

State v. *Omaha National Bank,* 128 Neb. 733, 260 N. W. 278.

State v. *F. & M. Bank,* 252 N. W. 917, 126 Neb. 245.

State v. *F. & M. Bank,* 253 N. W. 652, 126 Neb. 509.

If the Nebraska rule for the distribution of the funds of a defunct bank are applied to the instant case, then the claim of the petitioner would in fact be subsequent to other general creditors for the reason that the claim was otherwise secured.

It appears at least unusual that if the prerogative right exists in Nebraska it has never been asserted except in the one cited instance during all of the sixty-five years of judicial history of the state. In the words of various courts, we believe it is proper to say that "a prerogative which has remained so long practically useless can hardly be said to exist."

It is a cardinal principle of law that where the reason for a rule fails, then the rule will fail. The sovereign

prerogative to priority was based on the theory that public funds must be preserved. *U. S.* v. *Bank of North Carolina,* 6 Pet. 29, 8 L. Ed. 308. The reason for this rule fails in a case where the funds have been protected by a bond or insurance, as in the instant case. *U. S. F. & G. Co.* v. *McFerson,* 78 Colo. 338, 241 Pac. 728; *Brown* v. *American Bonding Co.,* 210 Fed. 844 (C. C. A. 9). To give the bonding company, which assumed a risk for compensation, priority in payment of its claim over general creditors, does certainly violate the spirit of the bankruptcy law, and under the rule of this court, as stated in *Local Loan Company* v. *Hunt,* 292 U. S. 234, 78 L. Ed. 1230, the court would be justified in denying the priority even though the state itself had by definite law given such priority.

CONCLUSION.

We conclude that under the plain language of Section 64-b (7) of the Bankruptcy Act a municipality was not intended to be, and was not, included;

That the prerogative right to priority in payment of debts is purely a sovereign right, and does not extend to municipalities;

That the right to priority cannot be asserted by the sovereign after title to the debtor's property has been divested;

That the common law right of priority of the sovereign is not in force in the State of Nebraska.

Respectfully submitted,

A. W. FIELD,
R. A. BOEHMER,
PERRY W. MORTON,
Counsel for Respondent.

APPENDIX.

State of Nebraska, ex rel.
O. S. Spillman,
Attorney General,
V.
S. S. Hadley Company, Bankers,
and R. O. Brownell, Receiver,
School District No. 6 of
Boone County, Intervener.
#27751 Filed June 16, 1931.

Wilson, C.

This is an action in equity, brought November 20, 1929, to impress the money in the hands of the receiver of the S. S. Hadley Company, Bankers, and the Guarantee Fund Commission, with a trust in favor of School District No. 6 of Boone County, in the sum of $1767.26, the amount of school district money in the bank when the receiver took charge. The petition prayed that it be decreed that the school district have a first and paramount lien on the money in the hands of the receiver in the amount of $1767.26, with interest at 7% from November 19, 1926.

The receiver answered, admitting certain allegations of the petition and alleged that on July 9, 1928, the school district filed its claim in the receivership; that on August 8, its claim was classified "as a preferred claim payable out of the Guarantee Fund," which classification was accepted by the school district; and that the classification and judgment entered by the court on August 8, 1928, are now res adjudicata.

Replying to the answer of the receiver as to classification of the school district's claim as a preferred claim, the school district alleged there was no adjudication or attempt to adjudicate the school district's rights to have the general funds of the bank declared a trust with respect to such funds as had been deposited in the name of Paul Roberts, treasurer of the school district, and subjecting the funds with a trust in favor of the school district.

On August 13, 1930, the court found the school district was not entitled to a trust fund and not entitled to be

paid out of the assets of the bank prior to the payment of other depositors; and that the general classification heretofore made of its claim should be confirmed and its claim paid out of the assets of the bank as the claims of other depositors are paid. The school district asserts as error that the decision of the court is contrary to the principles of law and equity.

The school district had a checking and deposit account in the bank in the name of "Paul Roberts, treasurer District No. 6," from July 15, 1926, to June 3, 1927. At the time the bank was taken over by the Department of Trade and Commerce on November 19, 1926, the amount due the school district was $4084.02. The actual cash in the bank at the time was $3519.35, but there were overdrafts charged against the bank of more than $5000.00. On April 25, 1928, the receiver took charge of the bank at which time there was due the school district the sum of $1767.26. At that time there was no actual cash in the bank, but the books showed there was a balance due the bank in the Omaha National Bank of $582.96. Mr. Crossland, auditor for the Department of Trade and Commerce, testified that was the amount "the receiver receipted for when he took over the bank." On June 3, 1927, the balance in the bank due the school district was $4400.26 and the account was not changed from then on.

The trial court apparently did not hold that the school district could not prosecute its claim for a trust fund and a first and paramount lien on the assets of the bank on account of the former classification and allowance of its claim. This question does not appear to be an issue before this court and is not contended for by the receiver in his brief. A similar question was presented in *State* v. *Bank of Commerce*, 54 Neb. 725, 727, where it is contended that the county by accepting 15% dividend was estopped from asserting that it was a preferred creditor. The court held that the county is not estopped from asserting that its claim is a preferred one because of the action of the county board and the treasurer in the premises. *State* v. *State Bank*, 119 Neb. 519, 229 N. W. 892. There is no showing that the receiver was prejudiced

by the school district's prosecuting its claim as a preferential one. *Wuerpel* v. *Commercial Germania Trust and Savings Bank*, 238 Fed. 269.

The school district contends that under the common law of England, the king was entitled to be paid out of the assets of his debtor subjects in preference to other creditors. The common law of the United States, prior to the admission of Nebraska to statehood, recognized the rights of the several states in their sovereign capacity to the preferential rights under the prerogative power as it existed in England in the king. The preferential rights of the sovereign states to be paid first out of the assets of the debtors under prerogative authority were adopted as a part of the law of the various states through the adoption of the common law by such states. The school district has cited in support of its contention numerous authorities from other jurisdictions. They are convincing. The trial court held, as shown by the briefs, that there is a complete plan for winding up the affairs of state banks in Nebraska as provided in Chapter 30, Section 24 of the Session Laws of 1925 (8-1, 102 Statutes of 1929). This section provides that the claims of depositors for deposits, not otherwise secured, and claims of holders of exchange, shall have priority over all claims except federal, state, county and municipal taxes; and that subject to taxes, shall, at the time of the closing of the bank, be a first lien on all the assets of the bank. The trial judge also makes reference to the note by the annotator in 65 L. R. A. 1333, where it is stated: "A statute covering the general field of dissolution and insolvency of state banks, which provides that all assets of such banks shall be ratably distributed among the creditors thereof, giving preference in payment to depositors, has been held to waive or extinguish any right which the state may have to a preference by virtue of its sovereignty. *Leach* v. *Exchange State Bank*, 200 Iowa 185, 203 N. W. 31." No authorities are cited from this state to sustain the contention that Nebraska possesses the crown's common law prerogative to have its debts paid in preference to the debts of other creditors. In *Freeholders of Middlesex Co.* v. *State Bank*, 29 N. J. Eq. 268, 271, in

answer to the contention that the crown's prerogative was a part of the common law of New Jersey, it is stated and held: "It certainly has never received judicial approval, and, so far as my knowledge extends, no law officer of the state has ever attempted to enforce it. For over one hundred years as an actual, practical prerogative of government, it has neither been exerted nor recognized, and this circumstance, as a matter of contemporaneous and long continued construction by all departments of the government, would seem to negative the existence of the right with a great emphasis." This doctrine has never been asserted, to our knowledge, in the sixty-odd years of judicial history in Nebraska. "A prerogative which has remained so long practically useless can hardly be said to exist." *Freeholders of Middlesex Co.* v. *State Bank, supra.*

In the closing paragraph of the school district's brief it is stated: "If this court should find that the school district is not entitled on the prerogative theory to the total amount due it, then the school district has identified $580 ($582.96) of the bank, and is entitled to a specific trust of that amount." In support of its contention the school district cites and relies on *State* v. *Midland State Bank,* 52 Neb. 1, where a similar state of facts existed. In that case, John Bondesson, as treasurer of the district, deposited in the bank $1308.08, money of the district, and subsequently made other deposits as such treasurer, amounting to $2241.83. He checked against the account from time to time and there was to his credit in the bank when it passed into the hands of the receiver, $1463.86. The bank was at all times advised of the fact that the money deposited belonged not to Bondesson but to the school district. It was held, per Post, C. J.: "1. It is not within the power of the treasurer of a school district by a general deposit of funds held by virtue of his office to create between such district and his banker the relation of debtor and creditor.

"2. A banker by receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity becomes thereby a trustee for the

beneficial owner with respect to such funds, and the same may, upon his insolvency, be recovered by the owner as a preferred claim against his estate."

In *City of Lincoln* v. *Morrison,* 64 Neb. 822, it is held, per POUND, C: "Where a trustee mingles trust moneys with his own funds, *cestui que trust* is entitled to a charge upon the whole; and so long as any portion of the mass into which the trust funds has entered remains in any form, it is subject to such charge, and may be followed and claimed." It is further held that "where such money has gone into the general estate of a trustee, who afterwards becomes insolvent, there is a presumption that it remains therein at his insolvency and the court will not say that it cannot be traced or has wholly disappeared where the contrary may fairly be inferred." *The City of Lincoln* v. *Morrison, supra,* is cited with approval in *Central National Bank* v. *First National Bank,* 115 Neb. 444 at page 450, 57 L. R. A. 885, per GOOD, J; and is also cited with approval in the same case by ROSE, J. at page 454.

While it is asserted by the receiver that the $582.96 was not cash in the bank, but only a credit in the Omaha National Bank, the receiver treated it as cash and receipted for it as such. In the absence of proof to the contrary, it must be presumed the Omaha National Bank was solvent and that it paid the amount due the bank to the receiver.

We conclude the trial court should have allowed the school district the $582.96 as a trust fund and given it a first lien thereon; and we therefore recommend that the decree of the trial court be reversed with directions to enter a decre in accordance with this opinion.

Reversed with directions.

Commissioners Thompson and Wolff concur.

Good and Eberly J. J. dissent.

SUPREME COURT OF NEBRASKA,
JANUARY TERM, A. D. 1931.
TUESDAY, JUNE 16, 1931.

Court met, pursuant to adjournment.

Present:

Charles A. Goss, Chief Justice,
William B. Rose, Judge,
James R. Dean, Judge.
Edward E. Good, Judge.
George A. Eberly, Judge,
L. B. Day, Judge,
Bayard H. Paine, Judge.

State of Nebraska, ex rel.)
O. S. Spillman, Attorney General,)
Appellee,)
v.)
S. S. Hadley Company, Bankers) Appeal from the District
of Cedar Rapids, Nebraska, and) Court of Boone County
R. O. Brownell, Receiver,) No. 27751
Appellees,)

School District No. 6 of Boone)
County, Intervener,)
Appellant.)

This cause coming on to be heard upon appeal from the district court of Boone County, was argued by counsel and submitted to the commission; and the commission having found error apparent in the record of the proceedings and judgment of said district court, and in its opinion having recommended that said judgment of the district court should be reversed and the cause remanded with directions to enter a decree allowing the school district the $582.96 in controversy as a trust fund, and that the school district be given a first lien thereon; and the court having examined said opinion, it is by the court considered, ordered and adjudged that said findings and recommendations of the commission be, and hereby are, approved and

said judgment of the district court is reversed and the cause is remanded with directions to enter a decree allowing the school district the $582.96 in controversy as a trust fund, and impressing a first lien for said amount thereon in accordance with the opinion this day filed herein; that appellant recover from appellees its costs herein expended, taxed at $; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Wilson, C.

Good and Eberly, JJ. dissent.

Supreme Court
} ss.
State of Nebraska

I, George H. Turner, Clerk of the Supreme Court of the State of Nebraska, do certify that I have compared the foregoing copy of Page 338 of Journal WW, containing judgment, in the case of State ex rel. Spillman vs. S. S. Hadley Company, No. 27751, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 4th day of January, 1936.

GEO. H. TURNER,
Clerk.

[SEAL]

By.....
Deputy.

Comp. St. Nebr. 1929, Sec. 27-224: When the Supreme Court Commission shall have been organized, the clerk of the supreme court under the direction of the supreme court shall examine the civil docket, and from such docket shall list such cases as in the opinion of the supreme court should be assigned to the commission for hearing.

and the court shall by formal order assign such list of cases to be heard by the commission under such rules and regulations as shall be prescribed by the court. In cases so listed and assigned the parties shall be entitled to be heard on printed briefs, and oral arguments, and the unsuccessful party shall have his motion for rehearing before the commission. In all cases so assigned the commission shall make full findings of fact, and conclusions of law arising from such facts, and an order or judgment disposing of the case. These findings of fact, conclusions of law and orders or judgments shall then be certified to the supreme court, and when the same shall have been approved and adopted by the supreme court, they shall be spread upon the records of the court and shall be a final disposition of such cases; PROVIDED, HOWEVER, such proceedings shall not be published in the reports of the court or in any other reports and shall establish no precedent and be authority only in that particular case. The court shall from time to time make and assign similar lists of cases to the commission which shall be disposed of in the same manner. (1929, p. 335).